

Internal Revenue Service
memorandum

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CAU-N-113576-98

date: October 14, 1998

to: John T. Lyons, Assistant Commissioner (International) CP:IN:OO

from: W. Edward Williams, Senior Technical Reviewer, Branch 1 (International) CC:INTL:Br.1

subject: *Request for Opinion - CIAT Membership of Puerto Rico*

In your memorandum dated June 24, 1998, you asked for a formal opinion regarding the matter of Puerto Rico's request for membership in the Inter-American Center of Tax Administrators (hereafter "CIAT", the organization's Spanish acronym). After reviewing the political status of Puerto Rico, CIAT organizational documents including its Articles of Incorporation,¹ Statutes, and Regulations,² it is our opinion that Puerto Rico does not qualify for CIAT regular membership,³ because the conduct of foreign affairs is assigned by the United States Constitution to the President of the United States and Congress, and the political subdivisions of the United States are forbidden from entering into alliances with foreign governments without the explicit authorization of Congress.

CIAT (REGULAR) MEMBERSHIP REQUIREMENTS

CIAT is an international organization whose purposes include encouraging "bilateral cooperation between members, mainly in an effort to promote voluntary compliance and counteract

¹ CIAT was incorporated in Washington D.C., on July 10, 1967, upon the filing of Articles of Incorporation with the Corporation Division, Office of Recorder of Deeds, under the District of Columbia Non-Profit Corporation Act. The CIAT Articles of Incorporation names five individuals as the organization's initial directors, including Sheldon S. Cohen, the Commissioner of the IRS, and the directors of the tax authorities of the governments of Ecuador, Guatemala, Venezuela and Brazil.

² Tax Administration Advisory Services provided our office with a May 1994 booklet named "Statutes and Regulations" which covers CIAT's corporate organizational articles and bylaws that were adopted through the 27th General Assembly of CIAT. The Statutes of the Inter-American Center of Tax Administrators will be hereinafter referred to as the CIAT Statutes.

³ Although this memorandum refers to states or countries as being eligible for membership, the actual members of CIAT are the executive officials of the national tax administrations of those political entities. In addition, the term "member" when used in CIAT Statutes and Regulations denotes "regular" membership, in the absence of explicit reference to another status (e.g. associate membership).

avoidance and tax evasion; as well as to promote studies on international double taxation problems."⁴ CIAT has two categories of membership. Executive officials for national tax administration of "States in the American Continent" may join CIAT as "regular" members,⁵ and executive officials for national tax administration of "non-American countries" outside the region may join as "Associate Members."⁶

Article Sixth of the CIAT Articles of Incorporation set forth the following membership requirements:

The members of the corporation shall consist of the executive officials of the national tax administrations of the countries participating in the Program of the Alliance for Progress and those of other countries of the Americas who are invited or who request membership in the corporation and are accepted as provided in the bylaws.⁷

Article 3 of the CIAT Statutes deals with persons "eligible" for (regular) membership and refers to "executive officials of tax administration, at the national level of those American Republics" who joined at the CIAT General Assembly in 1967, and with regard to future members refers to

"...those other countries having become members of the Center after that date as well as officials from States in the American Continent who are invited to become members or who request admittance and whose [sic] is accepted by the General Assembly."

Article 1 of the Regulations Governing CIAT Membership and Delegations to General Assemblies approved at the Fourth General Assembly held in May 1970 lists 27 "regular" members of

⁴ CIAT Statutes, Article 2 b.

⁵ CIAT Statutes, Article 3.

⁶ Criteria and Procedures for Accepting the Incorporation of Associate Members, Section I. Puerto Rico would not qualify for associate membership because as a part of the Caribbean Basin it is a part of the Americas.

⁷ Although Article 6 of the CIAT Articles of Incorporation refer to the "countries participating in the Program of the Alliance for Progress," that requirement is dropped in Article 3 of the CIAT Statutes. Today, the U.S. foreign policy initiatives in Latin America known as the "Alliance for Progress" are primarily viewed from a historical perspective, and participation in the Alliance for Progress is not considered as a requirement for CIAT (regular) membership.

CIAT,⁸ and in its last sentence refers to those "...[o]ther countries in the area who may join the Center in the future, in accordance with the Statutes."⁹

POLITICAL STATUS OF PUERTO RICO

The political status of Puerto Rico has changed over time, and it currently has a measure of political and fiscal autonomy from the United States. In the last years of Spanish rule Puerto Rico had achieved a measure of independence,¹⁰ but under the Treaty of Paris, which ceded Puerto Rico to the United States, the island lost its autonomy. It became a territory of the United States¹¹ and subject to the command of Congress. From 1900 to 1917, Puerto Rico was governed by the First Organic Act,¹² which created a body politic known as the "People of Porto Rico," imposed a short-lived tariff, and made no provisions for United States citizenship. In 1917, Congress enacted the Second Organic Act,¹³ providing for a greater measure of self-government. The Second Organic Act contained a Bill of Rights and a grant of collective United States citizenship to the People of Puerto Rico. Congress, however, retained major elements of sovereignty. In cases of conflict, Congressional statute, not

⁸ These members are Argentina, Barbados, Bermuda, Bolivia, Brazil, Canada, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Netherlands Antilles, Nicaragua, Panama, Paraguay, Peru, Surinam, Trinidad and Tobago, United States, Uruguay, and Venezuela. Although Bermuda and the Netherlands Antilles are not sovereign countries, the CIAT Executive Council amended Article 3 of the Bylaws to in order to explicitly eliminate the requirement of sovereignty for countries to be members of CIAT. See Letter from Jorge C. Ayala, CIAT Executive Secretary to Dee Ann C. Martinez, National Coordinator International Visitors Program (August 12, 1998).

⁹ CIAT membership is not granted "for the asking." Under Article 5 of the CIAT Statutes, the subject of a new country's membership would appear to be determined under the general procedures applicable to the approval of Resolutions of the General Assembly, which requires approval by a "simple majority" of the (regular) members. Article 5 also gives all (regular) members the "right to speak" and "vote" on matters coming before the General Assembly, so that the merits of the suitability of a prospective member may be raised before the General Assembly vote on admission.

¹⁰ Puerto Rico had become a semi-autonomous overseas province of the Kingdom of Spain, with significant authority in foreign affairs. Royal Decree of November 25, 1897, Constitution Establishing Self-Government in the Island of Puerto Rico by Spain in 1897, Documents on the Constitutional History of Puerto Rico (1948).

¹¹ Under Article II of the Treaty of Paris, Spain ceded the Island of Puerto Rico to the United States, and in Article IX, it was provided that "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." 30 Stat. 1754, 1759 (1899).

¹² Popularly known as the Foraker Act, 31 Stat. 77 (1900).

¹³ Popularly known as the Jones Act, 39 Stat. 951 (1917).

Puerto Rico law, would apply,¹⁴ and Congress insisted that the acts of the Puerto Rico legislature be reported to it, retaining the power to disapprove them.¹⁵

Congressional measures aimed at granting an increasingly larger share of self-government to Puerto Rico culminated in the enactment of the Puerto Rican Federal Relations Act,¹⁶ which defines the current basic relationship between the United States and Puerto Rico. The Federal Relations Act created a compact between the United States and Puerto Rico which, among other things, authorized the people of Puerto Rico to draft and approve its own constitution.¹⁷ A constitutional convention was held and a constitution drafted, which was approved by the people of Puerto Rico in a special referendum and by the Congress and the President of the United States.¹⁸ Thereafter, commonwealth status was proclaimed by the Governor of Puerto Rico on July 25, 1952.

Puerto Rico has been described as a "self-governing constitutional commonwealth voluntarily associated with the United States."¹⁹ Nevertheless, Puerto Rico is not formally a state of the Union although it is treated like a state for many purposes. Puerto Ricans are citizens of the United States and, as such, generally enjoy the rights and privileges of U.S. nationals.²⁰ Puerto Rico's currency is the U.S. dollar, and it has no postal system or armed forces apart from those of the United States. Puerto Rico is part of the U.S. customs and tariff system,²¹ and hence enjoys free trade with the United States. U.S. courts have jurisdiction over Puerto Rico, and decisions of the U.S. District Court for the District of Puerto Rico may be appealed to the U. S. Circuit Court of Appeals for the 5th Circuit.²² The Federal Relations Act provides that "[t]he statutory laws of the United States not locally inapplicable,

¹⁴ Sections 37 and 57 of the Jones Act, 39 Stat. at 964, 968 (1917).

¹⁵ Section 34 of the Jones Act, 39 Stat. at 961 (1917).

¹⁶ 48 U.S.C. § 731, *et. seq.*

¹⁷ 48 U.S.C. § 731d.

¹⁸ The Constitution of the Commonwealth of Puerto Rico was approved by the Constitution Convention of Puerto Rico on February 6, 1952, ratified by the people of Puerto Rico on March 3, 1952, and amended and approved by Congress by Joint Resolution of July 3, 1952, c. 567, 66 Stat. 327.

¹⁹ Puerto Rico Tax Reporter ¶ 707 (CCH).

²⁰ 48 U.S.C. § 737.

²¹ H. REP. NO. 2275, 81st Cong., 2d Sess. (1950); *Nestle Products, Inc. v. United States*, 310 F. Supp. 792 (Cust. Ct. 1970).

²² 48 U.S.C. § 737.

except as hereinbefore and hereinafter provided, shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws."²³

However, while residents of the island, Puerto Ricans may not vote in United States national elections nor do they have voting representation in the Congress of the United States.²⁴ The Federal Relations Act provides that the internal revenue laws of the United States do not apply to Puerto Rico, which has its own internal revenue structure and Treasury.²⁵ The income tax imposed by Puerto Rico is a separate tax from the U.S. federal income tax (which generally does not apply to Puerto Rican-source income) although there are many similarities in concept and administration. The old-age and survivors-insurance taxing provisions of the federal Internal Revenue Code, as well as the benefit provisions of Title II of the federal Social Security Act, are in force in Puerto Rico just as in the United States.²⁶ Federal unemployment tax coverage was extended to Puerto Rico in 1961.²⁷

DISCUSSION AND ANALYSIS

The unique political status of Puerto Rico raises the issue whether Puerto Rico would be considered to be a subdivision of the United States and thus prohibited from entering into any alliance or agreement by Article I, section 10 of the United States Constitution, or whether Puerto Rico's Commonwealth status gives it sufficient autonomy to enter into political alliances such as CIAT. Article I, section 10 of the United States Constitution provides:

No State shall enter into any Treaty, Alliance, or Confederation ... No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State, or with a foreign Power.

²³ 48 U.S.C. § 734.

²⁴ *Sanchez v. United States*, 376 F. Supp. 239 (D. P.R. 1974).

²⁵ After September 1, 1958, a decedent who was a citizen of the United States and a resident of Puerto Rico at the time of his death is considered a citizen of the United States for federal estate tax purposes unless his U.S. citizenship was acquired solely by reason of (1) his having been a citizen of Puerto Rico, or (2) his having been born or resided in Puerto Rico. A federal estate tax return may be required from the estate of such decedent who died after September 2, 1958. A federal gift tax return may also be required on a transfer of property by gift after September 2, 1958, from a U.S. citizen residing in Puerto Rico who acquired his U.S. citizenship other than by reason of (1) his being a citizen of Puerto Rico or (2) his birth or residence in Puerto Rico.

²⁶ I.R.C. § 1402(b), Treas. Reg. § 1.1402(b)-1(d).

²⁷ I.R.C. § 3306(j)(2).

The conduct of foreign affairs is thus assigned by the Constitution to the President of the United States and Congress,²⁸ and the exercise of that power is forbidden to the states of the Union and to the territories.²⁹ Commonwealth status did not change this fundamental federal relationship. The 1950-1952 legislation creating the Commonwealth did not expressly or by inference limit the United States' power over the conduct of foreign affairs for Puerto Rico.³⁰ The House Committee Report to the Federal Relations Act stated:³¹

It is important that the nature and general scope of S. 3336 [now 64 Stat. 319] be made absolutely clear. The bill under consideration would not change Puerto Rico's fundamental political, social, and economic relationship to the United States.

Responsibility for foreign relations was not included in the compact of association with Puerto Rico but remained in the hands of the federal government.³² In addition, Article VII, section 3 of the Puerto Rican Constitution provides that all Puerto Rican laws must be consistent with the applicable provisions of the United States Constitution.

Accordingly, since the federal government is sovereign in Puerto Rico, Commonwealth status did not endow Puerto Rico with foreign relations powers superior to those exercised by the states of the Union.³³ Treatment of Puerto Rico as a "state" for purposes of Article I, section 10, is consistent with the Commonwealth being treated as a state in regard to other provisions of the Constitution.³⁴

²⁸ *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).

²⁹ *Downes v. Bidwell*, 182 U.S. 244, 268 (1901).

³⁰ STATE DEPT., OFFICE OF THE LEGAL ADVISOR, WHO CONDUCTS THE FOREIGN RELATIONS OF PUERTO RICO? MEMORANDUM 2 (March 13, 1962), cited in Richard Camaur, *Puerto Rico's Role in Foreign Affairs*, 42 GBO. WASH. L. REV. 798, 809 at fn. 92 (1974).

³¹ H. REP. NO. 2275, 81st Cong., 2d Sess. (1950). The Senate Report contains language which is identical with the House Report. See S. REP. NO. 1779, 96 CONG. REC. 8321 (1950).

³² *Americana of Puerto Rico, Inc. v. Kaplus*, 368 F.2d 431, 435 (3d Cir. 1966); *United States v. Feliciano-Grafals*, 309 F. Supp. 1292, 1296 (D. P.R. 1970).

³³ Richard Camaur, *The Feasibility of an Identifiable Role for Puerto Rico in Foreign Affairs*, 42 GBO. WASH. L. REV. 798, 810 (1974).

³⁴ See *Mora v. Meijas*, 206 F.2d 377, 387 (1st Cir. 1953), in which the court stated that Puerto was not a state of the Union, but it can be considered a state within "a common and accepted meaning of the word." The Supreme Court accepted the analysis that Puerto Rico is sovereign over matters not governed by the Constitution and is thus a state for purposes of the Three Judge Court Act, 28 U.S.C. § 1253. *Cadero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 675 (1974). Although dissenting, Justice Douglas treated Puerto Rico as a state by his application of Fourteenth Amendment due process to Puerto Rico. *Id.* at 694.

Since the United States federal government has plenary power over foreign relations, special diplomatic arrangements with its territories and commonwealths must be done with the explicit authorization of the United States Congress. The term "agreement or compact" under Article I, section 10, has been construed to require congressional consent to any agreement which may encroach upon or interfere with the supremacy of the federal government.³⁵ Since Congress has not authorized admission of Puerto Rico into CIAT, Puerto Rico has no authority to unilaterally enter into any agreements to join CIAT.

In addition to judicial pronouncements, executive and legislative acts have confirmed the federal government's preemption over foreign policy in regard to Puerto Rico. When the commonwealth supporters were in power in the late 1980s and attempted to negotiate tax-sparing treaties with foreign governments, the U.S. Department of State thwarted such efforts.³⁶

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³⁵ *Searns v. Minnesota*, 179 U.S. 223, 247 (1900); *Wharton v. Wise*, 153 U.S. 155, 170 (1894). Reporter's Notes 10 to Section 201 of the Restatement (Third) on Foreign Relations Law of the United States (1987) specifically deal with U.S. territories and provides:

The United States conducts foreign relations for various territories linked to it by special arrangements which allow these entities substantially more authority in international matters than States have under the Constitution. ... Puerto Rico has been permitted by Act of Congress (88 Stat. 818, § 52) to become a member of regional institutions such as the Caribbean Development Bank. [1974] DIGEST OF U.S. PRACTICE IN INTL L. 31-33.

³⁶ See H.R. REP. NO. 104-713, pt. 1, at 20; Ediberto Roman, *Empire Forgotten: The United States Colonization of Puerto Rico*, 42 VILL L. REV. 1119, 1186 (1997).

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³⁸ *Puerto Rico Referendum Set*, WASHINGTON POST, August 19, 1998, at A-19; *Puerto Rican Legislature Sets Statehood Vote*, WASHINGTON POST, August 15, 1998, at A-26.

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CONCLUSION

It is our opinion that Puerto Rico does not qualify for CIAT regular membership, because the conduct of foreign affairs is assigned by the United States Constitution to the president and Congress, and the political subdivisions of the United States are forbidden from entering into alliances with foreign governments without the explicit authorization of Congress.

Please contact Michael Hara, (202) 874-1887, if you have any questions regarding this memorandum.


W. EDWARD WILLIAMS

³⁹ Guy Gugliotta, *Puerto Rico 'Fast Track' Plans Fade*, WASHINGTON POST, July 17, 1998, at A-19. See also *Puerto Rico's Moment*, WASHINGTON POST, July 18, 1998, at A-18.